No. 93-333

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JOHN S. ROBY, *et al.*,

Petitioners,

v.

THE CORPORATION OF LLOYD'S, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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COUNTER QUESTION PRESENTED

Whether this Court's unbroken line of precedents favoring enforcement of choice of forum and choice of law clauses in international agreements warranted dismissal by the courts below of Petitioners' purported federal securities law claims against the Society, Corporation, Committee and Council of Lloyd's of London and against their Managing Agents and Members' Agents at Lloyd's, arising out of Petitioners' membership in that very English institution.

STATEMENT PURSUANT TO RULE 29.1

Respondents the Society, Corporation, Committee and Council of Lloyd's, have no parent or subsidiary corporations within the meaning of Rule 29.1 of the Rules of the Supreme Court of the United States. Those Managing Agent Respondents that have parent or subsidiary corporations within the meaning of Rule 29.1 are listed below:

Managing Agent	Parent Companies and Subsidiaries
Anton Managing Agency	Merrett Holdings Plc.
AJ Archer & Co., Ltd.	AJ Archer Holdings Plc.
Birrell Smith Underwriting Agency	Cater Allen Holdings Plc.
BPC Underwriting Agencies	BPC Holdings Ltd.
Cater Allen Synd. Mgmt.	Cater Allen Holdings Plc.
Edwards & Payne Underwriting Agency	Sturge Holdings Plc.
Guest Barnes (Uwring. Agencies)	Cater Allen Holdings Plc.
Holmes Hayday Underwriting Agencies Ltd.	Sturge Holdings Plc.
BPD Kellett & Company Ltd.	AJ Archer Holdings Plc.

STATEMENT PURSUANT TO RULE 29.1 – Continued

London Wall Managing Agency Ltd.	London Wall Holdings Plc.
Mark Loveday Uwring. Agencies	Cater Allen Holdings Plc.
MIS Uwring. Agency Ltd.	Merrett Holdings Plc.
Merrett Syndicates Ltd.	Merrett Holdings Plc.
Murray Lawrence & Partners Ltd.	Murray Lawrence Holdings Ltd.
Oxford Syndicate Mangement Ltd.	Sturge Holdings Plc.
RD Robertson Uwring. Agency	Cater Allen Holdings Plc.
Stewart & Hughman Ltd.	Stewart Underwriting Agency
Sturge Marine Syndicate Mgmt. Ltd.	Sturge Holdings Plc.
Three Quays Uwring. Mgmt. Ltd.	Cater Allen Holdings Plc.

Managing Agent Respondents not appearing in the table above have no parent or subsidiary corporations within the meaning of Rule 29.1.

Those Members' Agent Respondents that have parent or subsidiary corporations within the meaning of Rule 29.1 are listed below:

STATEMENT PURSUANT TO RULE 29.1 – Continued

Members' Agent	Parent Companies and Subsidiaries
Alexander Howden & Beck Ltd.	London Wall Holdings PLC
Cater Allen Members Agency	Cater Allen Holdings PLC
Donner Underwriting Agencies Ltd.	Sturge Holdings PLC
Gardner Mountain & Capel –	Hogg Group PLC
London Wall Members' Agency Ltd.	London Wall Holdings PLC
PW Kininmonth Ltd.	A.J. Archer PLC
RW Sturge Ltd.	Sturge Holdings PLC
Sedgwick Lloyd's Underwriting Agents Ltd.	Sedgwick Group PLC
KC Webb (Underwriting) Ltd.	Hogg Group PLC
Willis Faber & Dumas (Agencies) Ltd.	Willis Corron Group PLC

Members' Agent Respondents not appearing in the table above have no parent or subsidiary corporations within the meaning of Rule 29.1.

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COUNTERSTATEMENT OF THE CASE

Respondents incorporate by reference the statements of fact in the opinions below (*Petition* at 7c-11c, 3d-6d, 2e-6e). As the courts below found, this is not a case involving the sale of publicly traded securities. Rather, it involves petitioners' memberships in Lloyd's, a unique and very English institution. Lloyd's is not an insurance company; it is a market, in which individuals such as petitioners (known as "Members" or "Names" at Lloyd's; see *Petition* at 3e) underwrite insurance risks on the basis of unlimited liability for their own losses and no liability for those of any other Member. Members are organized for administrative purposes into syndicates or groups of Members whose assets provide the capital against which risks are underwritten.[1] A professional Underwriter, himself a Member, makes the actual underwriting decisions, acting on authority delegated to him by the Members who have pledged some or all of their assets to capitalize

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[1] Petitioners originally sued their syndicates, but those claims were dismissed by the District Court on the ground that syndicates are not juridical entities under English or American law. *Petition* App. D. The Court of Appeals saw no reason to reach review of the District Court's ruling on this question in light of its finding that the forum clauses in issue were so broad that they would encompass the syndicates if need be. Petitioners do not seek review of the rulings of the courts below on this point. *See* Supreme Court Rule 14.1(a); *Heller v. Doe*, ___ U.S. ___, 113 S. Ct. 2637, 2650 n.4 (1993); *Hafer v. Melo*, ___ U.S. ___, 112 S. Ct. 358, 361 n.* (1991); *Hudson v. McMillian*, 112 S. Ct. 995, 1002 (1992). Accordingly, the so-called Syndicate Defendants are filing no response to the Petition.

his efforts for a given year. Most Members participate in more than one syndicate each year.[2]

The market at Lloyd's is regulated by respondents the Society, Corporation, Committee and Council of Lloyd's pursuant to delegated English statutory powers, analogous to the way that the New York Stock Exchange governs its membership. English statutes, and Lloyd's byelaws made pursuant to those statutes, establish the organizational pattern within which Managing Agents and Members' Agents have well-defined roles. Managing Agents manage the syndicates through which Members underwrite insurance risks. Members' Agents, among other things, provide Members with information regarding possible syndicates in which to participate.

More than 80 percent of the Membership at Lloyd's is English; the remainder come from some 80 different countries. American Members such as petitioners have historically constituted at most about eight percent of the total membership of Lloyd's, some 30,000 at its peak, and there are even fewer American Members today. These 110 petitioners are but a small fraction of the Americans who were Members of Lloyd's during the years pertinent to these claims.

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[2] Contrary to petitioners' assertions (*Petition* at 5 n.1), syndicates do *not* do business in the United States by virtue of the Lloyd's American Trust Fund (a fund held in trust in the United States for the sole benefit of United States policyholders). In *Landoil Resources Corp. v. Alexander & Alexander Serv., Inc.*, 77 N.Y.2d 28, 565 N.E.2d 488, 563 N.Y.S.2d 739 (1990), the Court of Appeals for the Second Circuit certified precisely this question under New York law to the Court of Appeals for the State of New York, which answered it with a resounding negative.

Persons such as petitioners, who wish to join Lloyd's, must apply for membership, must satisfy a test of good character, must be sponsored, must acknowledge their understanding of the risk of unlimited loss, must submit evidence of their financial ability to withstand losses, and must go to England to be interviewed and to sign their membership agreements. Although petitioners seek to characterize their insurance obligations as "securities," membership is personal; it cannot be assigned or traded.

The membership agreements signed by petitioners with Lloyd's (the General Undertaking) and with the Agents (the Agency Agreements) each contain broad forum selection clauses giving exclusive jurisdiction over disputes to the courts of England, and choosing English law to govern the parties' relationships. In addition, the Agency Agreements contain broad arbitration clauses. These clauses are necessary so that Lloyd's may govern its market coherently, under one legal system, for the benefit of all its members, and for the protection of policyholders throughout the world.

It is in this context that no fewer than three U.S. Circuit Courts of Appeals have recently enforced the forum selection and arbitration clauses in Members' agreements with Lloyd's and with the Agents in virtually identical cases alleging violations of United States securities laws, among them the Court of Appeals for the Second Circuit in this case.[3] There were no dissenting

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[3] The Seventh and Tenth Circuits have upheld dismissals in virtually identical cases. *See Bonny v. The Society of Lloyd's*, Nos. 92-1662, 92-2771, 1993 WL 292345 (7th Cir. Aug. 5, 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 658 (1992). In addition, the Court

opinions in any of these cases, and no Circuit Court has ruled to the contrary. This Court has already denied *certiorari* in the *Riley* case.[4]

Contrary to the statement of this case provided by petitioners, the holdings below, and those of other Courts of Appeals, are not a threat to American investors. These holdings explicitly are limited to the unique facts of these cases, as to which they are entirely fair and appropriate. petitioners' complaint alleged fraud and misrepresentation against all of the respondents. The District Court dealt with the case as one sounding in fraud, holding that English law provides adequate remedies for fraud such that it was reasonable to require petitioners to abide by their forum selection and arbitration clauses. In so doing, the District Court had before it a number of affidavits attesting to the extensive public and private remedies available under English law for fraud, for negligent misrepresentation, and for breach of contract.[5] It held that this case was, "closer to being entirely English than it is

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of Appeals for the Fifth Circuit dismissed tort claims brought by a Member against Lloyd's on the ground of *forum non conveniens* in favor of England. *Hirsch v. Oakeley Vaughan Underwriting Ltd.*, No. 89-2563, unpublished slip opinion (5th Cir. May 31, 1989), *cert. denied*, 498 U.S. 981 (1990).

[4] 113 S. Ct. 658 (1992).

[5] These affidavits came from English barristers on both sides of this case. There was no serious disagreement among them as to the significant remedies English law would provide to these petitioners. *See, e.g., Petition* at 20e-21e, 24c-27c for discussions of the evidence as to the available provisions of English law contained in the opinions of the courts below. *See also infra* pp. 16-19.

to being either international or a domestic American dispute."[6] The District Court discussed the specific English remedies available to petitioners, and found that it was fair to require petitioners to abide by their agreements to submit their disputes to English courts and arbitrators.

Petitioners argued to the Court of Appeals that English remedies were not adequate because English law, they represented, would require them to show proof of scienter and/or proof that the omissions they complained of had rendered misleading some affirmative statement made to them by respondents. This, they claimed, they could not do. Petitioners admitted to the Court of Appeals that they had no expectation of being able to prove many of the allegations contained in their Complaint even under U.S. law. Now, to this Court, petitioners present their case as essentially a failure to register case under § 12(1) of the Securities Act of 1933, the only U.S. statute alleged in the 169 paragraph Complaint for which there is no precise English law analogue. In doing so, petitioners implicitly concede that the rulings below on their § 12(2), Rule 10b-5, and RICO claims

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[6] *Petition* at 17e.

provide no basis upon which *certiorari* is warranted.[7] This tempest is now truly presented in a teapot.[8]

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[7] Similarly, petitioners argued to the District Court that *Wilko v. Swan*, 346 U.S. 427 (1953) is still good law, and based their case largely on that precedent. Told by the District Court that *Wilko* was "flatly overruled" in *Rodriguez de Quijas v Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (*Petition* at 17e), petitioners proceeded to the Court of Appeals on the basis that, though overruled, *Wilko*'s "essential lesson" lives on. Rejected again (*Petition* at 18c), petitioners now present *Wilko* to this Court in a footnote (*Petition* at 9 n.5) as a basis for attempting to argue that the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (adopted and codified by 9 U.S.C. §§ 201-208), does not apply here. Petitioners further misrepresent to this Court that the Court of Appeals so held, when in fact that Court held that it did not have to reach that issue in light of its determination that the forum selection and arbitration clauses in petitioners' various agreements were enforceable (*Petition* at 19c n.2). It will thus be for the English courts to determine whether petitioners must submit their disputes with their Agents to an English court or to an English arbitral panel.

[8] Although petitioners complain here, as they did in the courts below, about the supposed inadequacy of the remedies available to them in England, even prior to the decision of the district court in this case, some petitioners also brought actions against respondents in English courts, advancing claims stemming from the same events that underly this case. As of the date of this brief, at least 49 of the 110 petitioners are in lawsuits pending in England. Cases involving these petitioners are firmly set for trial in April and October, 1994.

REASONS FOR DENYING THE PETITION

I.

The Decision Below Follows the Decisions of this Court and of all Courts of Appeals that have Considered Identical Cases

The decision below follows this Court's consistent holdings and the decisions of the circuit courts, and petitioners seek review of jurisprudence as to which *certiorari* has been repeatedly denied. There are no new issues requiring review by this Court.

Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 658 (1992), and *Bonny v. The Society of Lloyd's*, Nos. 92-1662, 92-2771, 1993 WL 292345 (7th Cir. Aug. 5, 1993), dismissed the same causes of action by American Names who signed the same contracts, and joined many of the same syndicates, as petitioners. *Hirsch v. Oakeley Vaughan Underwriting Ltd. and the Society, Council, and Corporation of Lloyd's*, No. 89-2563, unpublished slip opinion (5th Cir. May 31, 1989), *cert. denied*, 498 U.S. 981 (1990), dismissed, in a case that arose from activities prior to the time when the Choice Clauses at issue here were included in membership contracts, a similar action by a Name against Lloyd's on grounds of *forum non conveniens*.[9]

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[9] The district court below dismissed on the Choice Clause, but also agreed with *Hirsch*:

> "The overwhelmingly English nature of this dispute likely also would warrant dismissal of the action on *forum non conveniens* grounds." *Petition* at 21e.

Ordinary *forum non conveniens* considerations, which dictate dismissal in favor of the courts of a foreign country, apply

Including this case, the three circuit courts of appeal which have examined the same fact pattern pleaded herein and the same legal arguments proffered herein[10] uniformly – without so much as a single dissenting or even concurring opinion – have enforced petitioners' contractual undertakings to utilize exclusively court proceedings or arbitration in England for any dispute arising out of or relating to their membership or underwriting at

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equally to actions brought under the United States securities laws. *Howe v. Goldcorp. Inves., Ltd.*, 946 F.2d 944 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1172 (1992). The court below correctly held, *a fortiori*, that international contractual agreements to achieve the same result should be honored.

[10] Petitioners' are careless in their assertion (Pet. at 19) that their arguments "about the effect of anti-waiver provisions and the adequacies of English law were not made [in *Riley*]". In fact, the same arguments have been made in each case and each court has found them ill-founded. *See, e.g.*, the *Petition for Certiorari* in *Riley*, No. 92-664 at pages 13-14:

> "I. B. The Choice Clauses at Issue Herein Operate to Waive Mr. Riley's Substantive Statutory Rights Under the U.S. Securities Laws."
>
> "II. B. Fundamental Public Policy is Violated When Enforcement of an Arbitration Clause Waives the Substantive Protections of the U.S. Securities Laws."

Petitioner in *Riley*, like petitioners here, argued that English law was inadequate because it would not recognize claims under the U.S. securities laws, and because of the limited immunity for Lloyd's governing bodies under the Lloyd's Act 1982. *Id.* at 14, 20. Petitioner in *Riley*, exactly like petitioners here, *extensively* briefed to both the Tenth Circuit and this Court the anti-waiver provisions of the 1933 and 1934 Acts and the supposedly far-reaching implications of the ruling on all sorts of foreign issuers of conventional securities. *See, e.g., id.* at 10-12, 22.

Lloyd's. Each court has applied the clearly articulated jurisprudence of this Court to the unique facts presented by the contractual participation of foreign underwriters in the Lloyd's insurance market. The courts below stressed the singular and complicated nature of Lloyd's, and the complex of unusual agreements which define the status of underwriting members at Lloyd's such as petitioners. District court opinion at *Petition* pp. 3e-6e, 9e-16e; circuit court opinion at *Petition* pp. 6c-9c, 11c-17c. As stated by the court below:

> We are satisfied not only that the Roby Names have several adequate remedies in England to vindicate their substantive rights, but also that in *this* case the policies of ensuring full and fair disclosure and deterring the exploitation of United States investors have not been subverted.
>
> [W]e hold . . . that the Roby Names have remedies under English law adequate not only to vindicate their substantive rights but also to protect the public policies established by the United States securities laws.

Petition at 24c, 27c (emphasis in original).

When petitioners entered a commercial relationship by becoming insurance underwriters, they and respondents agreed with one another that their respective rights and obligations would be "governed by and construed in accordance with the laws of England," and that any dispute would be settled in "the courts of England."[11] These

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[11] The text of the relevant paragraph from the General Undertaking can be found in the opinion of the Second Circuit

Choice Clauses were an integral part of a bargain which petitioners enjoyed for a number of years, and now seek to repudiate. Attempts to evade such clauses have been thoroughly considered and solidly rebuffed by this Court in *M/S The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

In *The Bremen* (not cited by petitioners), a contract for towing a drilling rig from Louisiana to Italy provided for judicial resolution of disputes in an English forum. In transit, the rig suffered storm damage and was towed to Tampa, Florida. In Florida the owner, like petitioners herein, "ignoring its contract promise to litigate 'any dispute arising' in the English courts," 407 U.S. at 3, filed suit in the United States district court. The district court denied a motion to dismiss, and the Court of Appeals affirmed, holding the forum-selection clause unenforceable on public policy grounds because the plaintiffs' claims would be subject to exculpatory clauses in England, but not in the United States, where they were against public policy. This Court reversed. Pointing out the "expansion of overseas commercial activities by business enterprises based in the United States," 407 U.S. at 9, it observed:

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at the top of page 12c of the *Petition*: "Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to [petitioner's] membership of, and/or underwriting of insurance business at, Lloyd's." Relevant provisions from the Agents' Agreements can be found in the district court's opinion at pp. 4e-6e of the *Petition*.

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.

Chief Justice Burger explained the reasons guiding the Court's ruling as follows: first, as here, a number of jurisdictions could otherwise be the situs of suit, and the parties justifiably wished to avoid the uncertainty and inconvenience which could come to pass as a result. 407 U.S. at 13. Secondly, the choice-of-forum clause was a "vital part of the contract" (as the Choice Clauses certainly were here, embracing two of the three substantive paragraphs in the General Undertaking; *see Petition* at 4a-5a) and the Court quoted with approval the statement of the English High Court of Justice that:

> [T]he force of an agreement for litigation in this country, freely entered into between two competent parties, seems to me to be very powerful.

407 U.S. at 14. Finally, this Court concluded with a strong endorsement of the forum-selection clause:

> Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.

407 U.S. at 15.

In *Scherk*, a contract covering the sale of several German businesses and associated trademarks provided for arbitration in France as the forum, with Illinois law as the applicable law. Like petitioners here, the American company sought to repudiate its contract, and filed suit

in Illinois claiming violations of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq*. The district court and the court of appeals held the Choice Clauses, in particular the arbitration clause, to be unenforceable. This Court again reversed, as it had in *The Bremen*. Speaking through Mr. Justice Stewart, this Court discussed its rationale for honoring Choice Clauses in international transactions. It emphasized the advantages to those engaged in international commerce in eliminating uncertainties in the applicable law, stating:

> Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

417 U.S. at 516.

This Court rejected the post-contract forum shopping so vividly illustrated by the instant case:

> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.

417 U.S. at 516-7. It reaffirmed the rationale and reasoning of *The Bremen*, 417 U.S. at 518.

This Court next decided *Mitsubishi*, holding that an agreement requiring arbitration in Japan is valid and enforceable and extends to statutory claims under the U.S. antitrust laws. In its analysis, this Court repeated, once more and in detail, the principles applicable to commercial transactions in international commerce, emphasizing the need for certainty and predictability in international dealings:

> [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context. . . .
>
> Notwithstanding the possibility that the English court would enforce provisions in the towage contract exculpating the German party which an American court would refuse to enforce, this Court [in *The Bremen*] gave effect to the choice-of-forum clause.

473 U.S. at 629. The Court condemned reliance upon purely domestic policies as a ground for striking down a choice clause, and summarized the law in these terms:

> *The Bremen* and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. Here, as in *Scherk*, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution. And at least since this Nation's accession in 1970 to the Convention, see [1970] 21 U.S.T. 2517, T.I.A.S. 6997, and the implementation of the Convention in the

> same year by amendment of the Federal Arbitration Act, that federal policy applies with special force in the field of international commerce.

473 U.S. at 631. *Accord, Carnival Cruise Lines, supra; Development Bank of Philippines v. Chemtex Fibres, Inc.*, 617 F.Supp. 55, 57 n.12 (S.D.N.Y. 1985) (concluding from *Mitsubishi* that "it is clear that the Convention does not contemplate the expression of local public policy as a barrier to the arbitrability of claims"); Mclaughlin & Genevro, *Enforcement of Arbitral Awards Under the New York Convention – Practice in U.S. Courts*, 3 Int'l Tax & Bus. Law. 249, 260 n.69 (1986).

Accordingly, the court below reinforced the *Mitsubishi* holding: "Moreover, international comity dictates that American courts enforce these sorts of clauses out of respect for the integrity and cooperation of foreign tribunals. *See Mitsubishi*, 473 U.S. at 629." *Petition* at 19c.

II.

The Decision Below Raises no New Issue

Petitioners' overheated contention that the court below utilized a "novel" approach to the enforcement of Choice Clauses that will supposedly create a gaping "loophole" in the American securities laws, resulting in mass exemption for hundreds of foreign "issuers" and a "severe competitive disadvantage" for American companies (*Petition* at 11-12), is built on a gross misstatement of what the courts below actually did. What these courts did, far from creating a rule with implications for other cases, was to go out of their way to limit their analyses to the facts and circumstances of the Choice Clauses at issue

in this case, and the unique nature of an underwriting Name's commercial relationships with his or her Members' and Managing Agents at Lloyd's, and with Lloyd's itself. It is sheer hyperbole to suggest that the Second Circuit's narrow, fact-bound opinion has *any* implications, much less far-reaching ones, for hundreds of foreign issuers of conventional securities, and it is nonsense to hint that those issuers are in any way comparable to Lloyd's. There is nothing in the record to support petitioners' assertions.

Nor did the courts below in any way employ a "novel" approach to the enforcement of Choice Clauses, contrary to petitioners' bald assertions (*see Petition* at 10, 13 n.11). Even apart from the fact that this Court has upheld Choice Clauses in an unbroken line of decisions stretching back over twenty years – a trend petitioners ignore – the Second Circuit's analysis in this case is patterned exactly on the analysis employed by this Court in *The Bremen* and *Scherk*. As the Second Circuit noted, those cases require a court considering the enforcement of a Choice Clause in an international contract to start with a presumption of the Clause's validity that can only be overcome by a "clear showing that the clauses are " 'unreasonable' under the circumstances." " *Petition* at 20c, *quoting The Bremen*, 407 U.S. at 10. As the court below noted, this Court has made this exception a very narrow one: a Choice Clause will be enforced unless its inclusion in the contract was procured by fraud, "if the complaining party 'will for all practical purposes be deprived of his day in court,' due to the grave inconvenience or unfairness of the selected forum", if plaintiff would be

deprived of all remedy, or if enforcement would violate a strong public policy. *Petition* at 20c.

The Second Circuit's analysis thus comes almost *verbatim* from *The Bremen*. *Compare* 407 U.S. at 15, 18-19. The only way one could call it "novel" would be to ignore *The Bremen* which, astonishingly, is what petitioners have done. The case is not cited in the *Petition*.

Petitioners do not even take issue with most of the Second Circuit's ruling. Petitioners argued below, but no longer, that they would be gravely inconvenienced by having to litigate in England.[12] *Id*. The district court was so unmoved by the balances of convenience argument that it indicated that had it not dismissed on the Choice Clauses, it would likely have granted respondents' fully briefed motion to dismiss on grounds of *forum non conveniens*. *Petition* at 21e. Petitioners suggested below, but no more, that English courts or arbitral forums would be unfair or biased. *Petition* at 20c.[13]

Petitioners fail to demonstrate how they are seriously harmed by enforcement of their Choice Clauses. At most, the *Petition* can be read to complain that the court below "misunderstood" and made "speculative and unsupportable" assumptions about the claims and remedies English law affords petitioners. *Petition* at 13. Nothing could be further from the truth. For example, petitioners brazenly

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[12] But not so gravely inconvenienced that 49 petitioners herein have in fact brought actions there. *See* footnote 4, *supra*.

[13] Petitioners never alleged, for example, that they were fraudulently induced into agreeing to the Choice Clauses. *Petition* at 20c.

claim that they can only impose liability on the Members' and Managing Agent respondents under "fault-based" theories that "require proof of fraudulent intent" (*Petition* at 15), yet petitioners conceded that they have available in England claims and remedies sounding in the tort of deceit; Sections 2(1) and 2(2) of the Misrepresentation Act 1967; and claims for pre-contractual material misleading omissions. The Second Circuit relied on the affidavit of petitioners' own expert when it concluded that English law "provides remedies for knowing or reckless deceit, negligent misrepresentation, and even innocent misrepresentation." *Petition* at 24c.[14]

Furthermore, as the court below correctly found, both the Members' and Managing Agents have express contractual obligations to make fair disclosure to their Names, and petitioners do not dispute the Second Circuit's finding that claims based on alleged failures to make material representations can be asserted in England under theories of breach of contract and violation of fiduciary duty – claims which clearly do not require proof of fraudulent intent. *See Petition* at 25c-26c. Indeed, English law is more favorable to petitioners in some ways than American law, for it would enable petitioners, if they can establish liability, to recover legal costs even under common law theories, and because English limitations periods are substantially longer than their U.S. counterparts. In sum, the court below was amply justified in concluding that "the available remedies [in England]

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[14] There is no dispute that English law provides remedies for fraud. *Petition* at 24c, 26c. *See also Riley*, 969 F.2d at 958.

are adequate and the potential recoveries substantial." *Petition* at 24c.

Petitioners abandoned the argument made below that English law is inferior to American law because it does not make "mere omissions" actionable unless something that is said is rendered misleading, in supposed comparison to § 12(2) of the 1933 Act, after respondents showed conclusively that the English and American standards are the same.[15] Petitioners complain that "controlling person" liability does not exist under English law, but as the court below noted, petitioners would have grave difficulty prevailing on such claims here. *Petition* at 15, 24c. Petitioners' unequivocal allegation that respondents the Society, Corporation, Committee and Council of Lloyd's "are not subject to liability at all" (*Petition* at 15) is false, as the court below found. *Id.* at 25c.

Petitioners appear to claim that it would be "fundamentally unfair" for English law to require them to demonstrate both wrongdoing and causation on the part of the alleged wrongdoer (each of whom has been identified in the complaint as a "racketeer"). *See Petition* at 14-15. As the court below found, "it certainly is not unfair for

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[15] The plain language of § 12(2) imposes liability only for omissions of material facts "necessary in order to make the statements . . . not misleading." It is black letter law that § 12(2) does not impose liability for "mere omissions" unless some affirmative statement is rendered misleading. *See* Loss, *Fundamentals of Securities Regulation* 1023 (1983); *In re Bank of Boston Corp. Sec. Lit.*, 762 F. Supp. 1525, 1538 (D. Mass. 1991). *See also* J. William Hicks, 7D *Exempted Transactions Under the Securities Act of 1933* § 16.05(7) at 16-210 and n.2 (1992).

English law to require proof of actual misconduct and reliance." *Petition* at 24c.[16]

That basically leaves petitioners with their § 12(1) claims, premised on the supposed failure to comply with the registration requirements of the 1933 Act.[17] But as the court below noted, those claims face severe difficulties. *See Petition* at 25c. The SEC has determined that if any "security" is involved in petitioners' underwriting of insurance at Lloyd's, compliance with Regulation D (governing limited offerings to qualified investors) meant that no registration would be required. *See* Commission letter, attached hereto as respondents' Appendix A. Petitioners' contention that the SEC has "defaulted" by supposedly not taking a "publicly disclosed, principled position"

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[16] Contrary to petitioners' implicit suggestion, it is not necessary that the foreign law afford precisely the same remedy as American law, merely that the foreign forum provide some form of remedy. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) (in the analogous area of decisions rendered under the doctrine of *forum non conveniens*, the possibility that the law of the more convenient forum will be less favorable to plaintiff can preclude dismissal only if "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all"). *Accord, Howe v. Goldcorp Inv. Ltd.*, 946 F.2d 944, 952 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1172 (1992) (dismissing securities fraud claims by American investor in Canadian company where Canadian law offered "somewhat similar protections").

[17] Petitioners do not argue that their pleading of boilerplate RICO counts is a reason to grant *certiorari*. The transformation of this case from a fraud and racketeering extravaganza into an alleged failure to comply with the registration requirements of the securities laws is one of the more remarkable of petitioners' retreats.

(*Petition* at 21) is disingenuous in the extreme: The Commission's letter was mailed to a United States Congressman, among others, to answer questions put by the name plaintiff below, petitioner John Steiner Roby. The SEC's position is both public and principled.[18] Petitioners' dissatisfaction with the view taken by the regulatory agency is hardly a proper ground for *certiorari*, particularly when the agency in question is not a party to this litigation and has refused petitioners' invitation to intervene.[19] To the extent it has not already been addressed herein, petitioners' argument that this case is about construction of the statutory phrase "waive compliance" was not presented to the courts below. Petitioners never made the "essential feature" argument (*see Petition* at 14), nor did

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[18] If the SEC's position is accepted, all of the claims pleaded by petitioners here vanish. Petitioners' contention that the court below was "procedurally wrong" in considering the merits of their § 12(1) claims (*Petition* at 17 n.15) is equally disingenuous: respondents had moved to dismiss the § 12(1) claims on a variety of grounds, including statute of limitations, failure to allege "seller" status of certain defendants, and failure to allege controlling person status. In addition, the Commission's letter was in the record below, was quoted by Judge Lasker (*see Petition* at 14d-15d) and was referred to, albeit not by name, by the Second Circuit (*see Petition* at 25c).

[19] At oral argument before the Second Circuit, petitioners' counsel responded to a direct question from that court by admitting that petitioners had asked the SEC for support in this litigation and had been rebuffed. The agency would have a perfectly good reason for not wanting to give an advisory opinion on the enforceability of Lloyd's Names' Choice Clauses: under the agency's already expressed view, the question in the context of this case is entirely moot.

they cite any of the cases that appear at page 15 of the *Petition*.

Since the issuance of the decision below, the Seventh Circuit's decision involving these same forum selection provisions confirms its correctness, and confirms that there are no new issues requiring review by this Court. *Bonny v. The Society of Lloyd's*, Nos. 92-1662, 92-2771, 1993 WL 292345 (7th Cir. Aug. 5, 1993). Having carefully reviewed this Court's decisions in *Bremen*, *Scherk*, *Mitsubishi Motors* and *Carnival Cruise Lines*, and the singular factual details of the arrangements by which an individual obtains the right to participate in insurance underwriting at Lloyd's, the Seventh Circuit came to the same correct result as the court below:

> In the present case, we are satisfied that several remedies in England vindicate plaintiffs' substantive rights while not subverting the United States policies of insuring full and fair disclosure by issuers and deterring the exploitation of United States investors. 1993 WL 292345 at *4.

Far from creating any "loophole" in the protection afforded to Americans interested in participating at Lloyd's, as argued by petitioners, the decision as to which review is sought expressly addressed that potential concern. The court simply concluded that petitioners failed to make a showing that the specified remedies available to them in England were insufficient, in the light of petitioners' own expert's affidavit. There is nothing in the decision below warranting review.

Finally, although the decision below dismissed petitioners' case on the basis of the contractual Choice

Clauses, petitioners' claims here were never more than shaky, for at least the following reasons:

a) The District Court also had dismissed the action against most defendants because of petitioners' binding agreements with them to *arbitrate* any disputes. Said the court below:

> We might have referred to the [United Nations] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517 . . . for further support with respect to the arbitration clauses. *Petition* at 19c n.2.

It did not, but rather relied on *The Bremen* jurisprudence of this Court for forum selection clauses, because "an arbitration clause is merely a specialized type of forum selection clause. *See Scherk*, 417 U.S. at 519." *Id.* As the District Court ruled: "none of the three rationales plaintiffs assert for the non-application of the Convention is persuasive." *Petition* at 18e.

b) Claims against over twelve hundred of the named defendants (the "syndicates") had already been dismissed because those defendants were found to lack juridical status in either the United States or the United Kingdom. Petitioners do not question that ruling here.

c) Ordinary *forum non conveniens* considerations independently dictated sending petitioners' claims to England:

> The overwhelmingly English nature of this dispute likely also would warrant dismissal of the action on *forum non conveniens* grounds. *Petition* at 21e.

d) Also pending before the District Court were fully-briefed motions to dismiss the complaint for failure to plead fraud with particularity, failure to plead with specificity controlling person liability and other defects in stating a Securities Act cause of action, failure to plead adequately the alleged RICO violations, and failure to plead compliance with the statute of limitations.

e) The SEC had previously determined that petitioners held no "security" that required registration.

CONCLUSION

The petition for *certiorari* should be denied.

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APPENDIX A

[Seal]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
EXECUTIVE DIRECTOR

Stop 2-6

October 11, 1991

Taylor R. Briggs, Esq.
LeBoeuf, Lamb, Leiby & MacRae
520 Madison Avenue
New York, New York 10022

RE: FOIA #91-1351

Dear Mr. Briggs:

This is in response to your letter dated October 3, 1991, and received in this Office on October 4, 1991, in which you request access to a letter from Ms. Mary E.T. Beach to Don J. Pease concerning Lloyd's of London's solicitation of American citizens to become participants in Lloyds, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. We have identified the responsive letter and made a determination to grant access. A copy of the letter is enclosed. If you have any questions, please contact Arleta D. Cunningham of my staff at (202) 272-3651

Sincerely,

[Hannah R. Hall]

Hannah R. Hall
FOIA/Privacy Act Branch Chief

Enclosure

[Seal]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

August 5, 1991

CHAIRMAN'S OFFICE
MAILED
AUG 5 1991

The Honorable Don J. Pease
United States House
of Representatives
2410 Rayburn Building
Washington, D.C. 20515

Signed by: _____

Re: Lloyd's of London

Dear Congressman Pease:

I have been asked to respond to your letter of June 20, 1991 in which you ask certain questions pertaining to a letter you received from one of your constituents, Mr. John Steiner Roby. Mr. Roby's letter concerns the solicitation of American citizens to become participants in Lloyd's of London ("Lloyd's") by becoming Names, and the subsequent losses of those who become Names.

Before we address your specific questions perhaps it would be helpful if we briefly described the unique structure of Lloyd's, as it is not an insurance company in the manner of a typical U.S. insurance company. There are three basic components of Lloyd's. First is Lloyd's itself ("Lloyd's") which is not a company but rather an insurance marketplace at which individuals conduct separate insurance underwriting businesses. The second component is the Corporation of Lloyd's, whose sole function is to provide the premises, administrative staff and support services. The third component is the Council of Lloyd's

(the "Council") which is the body charged with regulating the entire Lloyd's structure. The individuals who comprise Lloyd's, called "Members" or "Names", conduct their underwriting business exclusively through "Members' Agents". All Members must be elected to their memberships by the Council and must be sponsored by two other members. All of a Member's underwriting business at Lloyd's is conducted pursuant to a standard Agency Agreement with the Members' Agent. The Agency Agreement grants the Members' Agent continuing authority to conduct the Members' underwriting business, including accepting risks and effecting reinsurance, collecting all premiums due the Member, and paying all liabilities and other obligations of a Member. In essence, a Member delegates complete control of his affairs to the Members' Agent and the Member may take no part in the day-to-day business. The Members' Agent exercises virtually complete control over Members' syndicate participation. Finally, the active insurance underwriters at the end of the chain are principals or employees of "Managing Agents", which are U.K. Corporations or partnerships approved by the Council to accept insurance risks at Lloyd's. Managing Agents are either also Members' Agents or are the agents of such Members' Agents.

Your first question is whether there is any regulation of Lloyd's solicitation of participations in the United States. The staff of the Commission's Division of Corporation Finance has had discussions on two occasions with Lloyd's concerning the applicability of the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") to the solicitation of

U.S. Citizens to participate in Lloyd's. It is the Division's position that the solicitation of participations involves the sale of a security, with the issuer of that security being the particular Members' Agent involved. Accordingly, such U.S. sales would be subject to all of the provisions of the Securities Act and the Exchange Act, including the anti-fraud provisions. At the time of those prior discussions, it was determined that if the Members' Agents solicited participations in accordance with the procedures proposed by Lloyd's counsel (an offering structure intended to comply with the Commission's Regulation D), registration under the Securities Act would not be required. However, in light of the issues raised by Mr. Roby and others, the staff may consider whether the actions of Members' Agents were consistent with the earlier representations of counsel and whether further action is appropriate.

Your second question is whether the participations in Lloyd's are analogous to partnerships and what regulations apply to those types of investments. While Lloyd's participations do more closely resemble general partnership interests than they do other securities, such as shares of common stock, they are quite unique investments. For example, they may only be held by individuals, they are not transferable, even under the laws of descent and distribution, and the liability thereunder is unlimited although no Name is liable for the "share" of other Names. There is no existing precedent as to whether Lloyd's participations are securities but, as was pointed out above, the Division of Corporation Finance believes

they are securities and as such are subject to the provisions of the Federal securities laws in the same manner and to the same extent as more conventional securities.

Finally, you ask whether U.S. participants in Lloyd's properly can obtain venue in litigation against Lloyd's in the United States. Your constituent asserted that litigation against Lloyd's in the United States has been terminated as not being properly venued. We are not aware of the litigation to which your constituent refers, although it may involve a cause of action outside the Federal securities laws. However, subject to certain limitations and conditions, the provisions of the Federal securities laws generally are as applicable to the sales of foreign securities (including participations in Lloyd's) in the United States as they are to the sales of domestic securities.

I hope that the above material will be helpful in responding to your constituent's concerns. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Mary E. T. Beach
Senior Associate Director